

5331

A. Zuckerman

PL 2

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-190060

DATE: February 10, 1978

MATTER OF: Palmetto Enterprises

DIGEST:

1. Use of "award amount" [fee] provisions in advertised procurement for mess attendant services is proper where agency obtains necessary Armed Services Procurement Regulation deviation for this purpose.
2. Protest based on allegations of statutory and regulatory violations, without meaningful explanation as to why or how the violations exist, is without merit.
3. The fact that IFB pricing structure places risk on the bidder does not render IFB improper, since bidders are expected to take risk into account in formulating their bids.
4. Contract for mess attendant services is not a personal services contract since there is no direct Federal supervision of contractor personnel.
5. Where experimental contract structure may result in award that does not represent lowest total cost to the Government, it is recommended that agency fully consider this aspect of "experiment" when evaluating results achieved.

Palmetto Enterprises (Palmetto) protests the award of a contract for mess attendant services for the San Diego Naval Station under invitation for bids (IFB) N00122-77-13-1526 issued by the Naval Regional Procurement Office, Long Beach, California. Protester has alleged a long list of statutory and regulatory (Armed Services Procurement Regulation (ASPR)) violations in connection with the solicitation, with the thrust of the protest being the asserted undue risk placed on bidders because of the pricing and evaluation

B-190060

format of the IFB and the use of what the protester perceives as a personal services contract.

The structure of the IFB is novel for an advertised procurement--it contains "award amount" provisions borrowed from cost-plus-award-fee type contracts with attendant award determination features; it provides a fixed-price "service rate" which includes direct labor costs, profit, overhead and G&A; it provides for reimbursement at that rate based on actual labor hours incurred up to a specified maximum for various levels of service, but requires the contractor to provide any additional labor without reimbursement if necessary to meet the levels of service required by the specification; and it permits the bidder to bid only the "service rate", without varying the specified hours (manning level) upon which bids will be evaluated, i.e., the bid "price" is to be evaluated on the basis of the bidder's specified service rate multiplied by the Government's designated maximum manning level with award to be made to the low, responsive, responsible bidder.

The contracting officer states the IFB structure is experimental and explains its use as follows:

"Competitive procurement of [mess attendant] services has historically been extremely difficult. This difficulty arises largely from the fact that the contracts can be performed with an absolute minimum of capitalization. The lack of a direct requirement for a specified number of man-hours and the almost negligible administrative costs for the contract effort have combined to encourage gross underbidding by at least some bidders in almost every competitive procurement for these services. Such circumstances open issues of bidder

B-190060

responsibility and mistakes in bid. Resolution of a multiplicity of such questions in time to permit award so as to ensure the vitally required continuity of services is an extremely difficult problem which has been faced with frequency.

"After award of the contract, a second set of conflicting goals asserts itself. The contractor, being in a fixed-price environment, will most naturally attempt to perform the required services with a barely sufficient minimum of personnel.

"The Navy's managers of messes, however, are under strong and continuing pressure to upgrade the quality of the messes, in terms of the quality of the food and its presentation, the service rendered to the personnel eating at the mess, and the overall attractiveness of the facility. These pressures arise from considerations both of sanitation and morale of Navy personnel. The importance of mess operations to the Navy's ability to recruit and retain its personnel is recognized in an annual series of awards * * * given for superior messes, ashore and afloat. The awards are highly coveted by all Commands, and competition for them is keen. Such conflicts between the efforts of the contractor to minimize services and the desires of the mess management to expand services leads directly to claims action. The claims themselves, based as they frequently are on 'additional manhours' required * * * are burdensome to evaluate and settle, since there are seldom any baseline data which permit a determination as to the number of manhours originally to be provided. Such claims are also

B-190060

often motivated and magnified by the desire of the contractor to 'get well' from his originally too-low bid.

"From extensive experience with attempting to resolve both procurement and administrative difficulties in mess attendant contracting, personnel of the Naval Regional Procurement Office, Long Beach, undertook the design of an alternative approach to these efforts. The goals of the new approach are,

- (1) to eliminate 'under' bidding
- (2) to reward higher productivity
- (3) to provide a definitive basis for award
- (4) to encourage and reward higher quality service"

The contracting officer also states that:

"The pricing structure of -1526 addresses the deficiencies inherent in normal mess services contract formats by eliminating the incentive to underbid (and 'recover' by subsequently underperforming), and by providing direct financial inducements to provide superior service. Furthermore, the structure does not penalize efficiency.

"* * * normal mess services contracting structures are fixed-price, based upon estimated meal-counts, and providing (typically) for price adjustments whenever the actual number of meals served during a month falls outside parameters

B-190060

set forth in the contract. In order to permit management flexibility and to obtain the potential benefits of higher productivity, such contracts contain no direct statement of man-hours to be used in the performance of the effort. Each bidder is required to submit a manning chart for purposes of assisting in the determination of responsibility, but such charts have no impact on the contractual requirements.

"By contrast, the pricing structure of -1526 sets forth a number of manhours ('authorized maximum manhours') for three levels of meals. The bidder offers a 'service rate' price, which determines the bid evaluation price. The 'service rate' is the basis for all compensation under the contract * * * [including] any additional risk amount the bidder wishes to include against the contingency that the 'authorized maximum manhours' are insufficient for performance at the required levels."

The IFB establishes an annual total of 116,000 manhours as the "authorized maximum manhours." Under the contract, and barring a change in Government requirements, a contractor would not be reimbursed for any hours actually incurred above the level of hours established in the IFB for the quantity of meals served during any given month. The IFB also provides for \$38,545 as a maximum "award amount" which can be earned by the contractor, establishes criteria upon which the award amount will be based, provides for the use of "performance reports" to be evaluated by a "Performance Evaluation Board", whose recommendation will be considered by the Commanding Officer in determining the "award amount", and provides that the determination by the Commanding Officer in this regard shall be final, and not subject to the "Disputes" clause of the contract.

B-190060

We find the protester's allegations to be without merit. For example, the protester complains that:

"The solicitation calls for the provision of data from which the contracting officer will 'evaluate' the bid for 'responsiveness'. This procedure in reality is a two step [procurement which] does not contain objective bid evaluation criteria in violation of ASPR 2-201 section D(1), 1-705.4, and 1-903."

The only "data" which the IFB requires are proposed manning charts for the purpose of assisting the contracting officer in "making an affirmative determination of responsibility." The manning charts do not become part of the contract and do not limit the contractor's obligation to provide services sufficient to satisfy specification requirements. The requirement to provide information to assist in the determination of responsibility does not convert an ordinary IFB into a two-step procurement, since the "data" does not constitute a proposal requiring specified evaluation criteria, as in a two-step procurement. See ASPR 2-503.1. ASPR 1-705.4 deals with the certificate of competency procedure in connection with a nonresponsibility determination regarding a small business; ASPR 1-903 concerns minimum standards for responsible prospective contractors. We fail to see in what regard those regulatory provisions have been violated by the invitation. Moreover, ASPR 1-201 section (D) (1) concerns evaluation factors for award. Inasmuch as the invitation provides for award to the low responsible bidder we do not understand how that provision has been violated.

Another contention of the protester is that:

"The use of an award fee of a subjective nature is not authorized"

B-190060

for use with an advertised firm fixed-price contract and as such is in violation of ASPR 3-404.4 and 3-404.3."

Protester is correct in noting that the "award amount" provisions in the IFB are not authorized for use in an advertised procurement. In this regard, however, the record shows that the contracting agency sought and obtained a one-time ASPR deviation pursuant to ASPR 1-109.2 to proceed with the instant solicitation in order to "test an innovative new approach to contracting for mess attendant services." Moreover, the cited portions of the regulation which are alleged to have been violated deal with types of negotiated fixed-price contracts, i.e., those with economic price adjustment provisions in the case of ASPR 3-404.3, and fixed-price incentive contracts in the case of ASPR 3-404.4, and are not apposite to this solicitation. We therefore find no merit to this contention.

The protester next contends:

"The contract also provides for an unlawful reduction in the contract price based on a reduction of hours furnished and as such is a violation of ASPR 2-407.4."

ASPR 2-407.4 concerns the evaluation of bids when the solicitation or bids contain economic price adjustment clauses. Since no such provisions are contained in the invitation, the relevance of the cited ASPR provision to the proposed contract escapes us. Moreover, as explained above, the contract is not one for a total fixed price--only the hourly "service rate" is fixed by the bidder, and payment is to be made on the basis of the actual number of direct labor hours expended in the performance of the contract (up to the stated maximum) at that hourly rate. The evaluated price based on the Government's estimated maximum quantity of manhours is not the contract price, and therefore, we do not perceive an "unlawful reduction in the contract price" as contended by Palmetto.

B-190060

Other protest allegations are similar--they are merely allegations of statutory and regulatory violations without meaningful explanation as to why or how the violations exist. For example, Palmetto claims that by removing the "award amount" determination from the application of the "Disputes" clause, the Federal courts have somehow been deprived of their jurisdiction. We do not believe it necessary to address those other points raised by the protester.

With regard to the question of risk, protester in effect makes the point that the recovery of overhead and G&A, some of which is fixed and not subject to direct labor fluctuation, and the ability to earn a profit, are wholly a function of the number of direct labor hours expended in the performance of the contract; that the number of hours to be worked are not wholly within a contractor's control, being dependent on the number of meals served; and that the "ceilings" (maximum levels of service for which contractor can be reimbursed) are established by the Government, not the bidder.

It is clear that there is a certain amount of risk associated with the type of contract here involved, that risk being that reimbursement at the service rate may be insufficient to cover overhead and profit, depending upon the total labor hours which are provided (and for which reimbursement is allowed) under the contract. This risk is magnified by the JEB statement that bidders who "believe that the Government's estimate of manhours is high and they can consistently maintain a high level of 'Responsiveness' and 'Quality of Work' with a lower number of manhours may reflect this confidence by bidding a lower 'Service Rate' which will result in a lower total bid for purposes of bid evaluation." [emphasis added.] Obviously, the lower the Service Rate, the higher the risk that overhead and profit will not be covered by the contract payments.

The presence of such risk, however, does not render the solicitation improper. Some risk is

B-190060

inherent in most types of contracts, and bidders are expected to allow for that risk in computing their bids. Here, it is anticipated that bidders, when determining their bids, will take into account both the possibility that reimbursable hours under the contract might well vary from the Government estimate (ceiling) and the possibility of receiving part or all of the amount set aside for the award fee. This is not contrary to any statute or regulation of which we are aware.

The protester also asserts that the IFB represents an attempt by the Navy to obtain a personal services contract under the guise of a contract for nonpersonal services.

Personal services contracts are those in which there exists an employer-employee relationship between the Government and the contractor's employees. We have held that the generally accepted test of Federal employment includes three requirements: (1) performance of a Federal function; (2) appointment or employment by a Federal officer; and (3) supervision and direction by a Federal employee. See 44 Comp. Gen. 761 (1965). While it is true that the operation of the Navy mess is a Federal function, the proposed contract does not give any Federal officer control over the employment of the contractor's employees, except to the extent that those employees are subject to medical examination to assure compliance with sanitation standards, that they receive security approval and identification from the Security Officer before access to the facility is permitted, and that they be removed from work for the "carrying aboard" of alcoholic beverages on Government premises. There are no provisions of the proposed contract which can reasonably be viewed as authorizing supervision of the contractor's employees by a Federal employee. We therefore do not find any basis to conclude that this is a procurement for personal services.

Since we find no merit to the protester's contentions, the protest is denied.

B-190060

We are concerned, however, over one aspect of this solicitation. As indicated above, the contractor will only be reimbursed for the actual direct labor expended, and thus if it provides less hours for the same level of service it will receive less payment (except for the potential award fee which may be earned). Since all bidders would be employing essentially the same labor pool upon winning the award, and because labor costs would be essentially identical, a contractor would be required to provide the maximum hours available in order to maximize recovery of indirect costs and earn a profit for his services, as no saving can result in the direct labor cost from which the contractor could benefit. Thus, if a bidder believed it could serve the requisite number of meals with 100,000 hours, rather than the 116,000 hours specified by the Government, in order to derive any benefit through good, efficient and perhaps more costly management practices, it would probably have to bid a higher hourly "service rate" charge since it would only be paid for the 100,000 hours actually incurred. Accordingly, under this solicitation a bid offering a higher "service rate", might well represent lower total cost to the Government than a bid offering a lower service rate because of the lesser number of direct labor hours that would be ultimately incurred under the former. As a result an award based solely on the "service rate" might not result in the lowest cost to the Government as required by 10 U.S.C. 2305(b). See 36 Comp. Gen. 380 (1956). We are recommending to the Secretary of the Navy that this aspect of the "experiment" be fully considered in the evaluation of the results achieved by use of this method of procurement.

Deputy

R. F. K. M.
Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

A. Zuckerman

PL 2

B-190060

February 10, 1978

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision in the protest of Palmetto Enterprises, Inc. over the award of a contract under invitation for bids No. NOO123-77-B-1526, issued by the Naval Regional Procurement Office, Long Beach, California, for mess attendant services at the United States Naval Station, San Diego, California.

The solicitation was characterized by the contracting officer as an "experiment" which is being tried in an attempt to overcome the unsatisfactory results the Navy is encountering in the operation of the Navy mess utilizing the services of mess attendant service contractors.

Although we have denied the protest, our decision expresses concern that the experimental contract structure which only permits bidders to specify an hourly "service rate" may result in the award of a contract to a bidder whose bid price may not represent the lowest total cost to the Government after considering total man-hours required to perform the contract work. It may be more effective to permit bidders to specify not only the "service rate" but also the maximum hourly ceilings by which they would be contractually bound. In any event, we recommend that the Department of the Navy fully consider this aspect of the "experiment" when evaluating the results achieved by use of this method of procurement. We would appreciate to be informed of the results of the evaluation.

Sincerely yours,

Deputy

A. Zuckerman
Comptroller General
of the United States

Enclosure